TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 628.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

CLARA HOLTE.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED SEPTEMBER 19, 1914.

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1 & 2 District Court of the United States for the Eastern District of Wisconsin.

UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

At a stated term of the District Court of the United States of America for the Eastern District of Wisconsin, begun and held according to law at the city of Milwaukee on the first Monday (being the fifth day) of January, A. D. 1914.

Present, the Honorable Ferdinand A. Geiger, judge, presiding.

Among other the following proceedings were had, to wit:

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
CLARA HOLTE AND CHESTER C. LAUDENSCHLEGER, DEFENDANTS.

Be it remembered that on the 16th day of July, A. D. 1914, the grand jury presented the following bill of indictment against the above-named defendants:

3 In the District Court of the United States for the Eastern District of Wisconsin, of the January term, in the year of our Lord one thousand nine hundred and fourteen.

EASTERN DISTRICT OF WISCONSIN, *ss:*

The grand jurors of the United States of America, duly empaneled and sworn, in and for the Eastern District of Wisconsin, in said District Court, upon their oaths present:

That Chester C. Laudenschleger and Clara Holte, each late of the city of Milwaukee, in the county of Milwaukee, in the district aforesaid and within the jurisdiction of this court, hereinafter in this indictment called the defendants, heretofore, to wit, on and before the 27th day of March, 1914, at Barrington, in the State of Illinois, did conspire, combine, confederate, complot, and agree together to commit the acts made an offense and crime against the said United States of America by the act of June 25th, 1910, chapter 396, 36 Stats. L., 825, of the Revised Statutes of the United States, and commonly called the white-slave traffic act; that is to say, the said defendants and each of them, that they might the more easily enter into, assume, and safely continue and maintain illicit sexual and libidinous relations then and there conspired, combined, confederated, acquiesced, acceded, and deliberately agreed together that he, the said Chester C. Laudenschleger, should then and there transport in interstate commerce, and cause to be transported and should aid and assist in obtaining transportation for, and should procure and obtain, and cause to be procured and obtained, and aid and assist in procuring and obtaining a ticket to be used by the said Clara Holte evidencing her right to be so transported and to go, and that she, the

said Clara Holte, should then and there consent and agree to go and do and allow herself to be prevailed upon, persuaded, induced, enticed, and coerced to go and to be carried and transported in
4 interstate commerce as aforesaid over and along and upon the line of the Chicago & Northwestern Railway, a corporation organized and existing under the laws of the State of Wisconsin, and a common carrier engaged in interstate commerce and in the interstate transportation of passengers from Barrington, in the State of Illinois, to Milwaukee, in the State of Wisconsin, for the purpose of prostitution, debauchery, and other immoral practices.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and say:

That in pursuance of the said unlawful, corrupt, felonious, and wicked conspiracy, combination, confederation, and agreement, and to effect and attain the object thereof, the said Chester C. Laudenschleger, on the said 27th day of March, 1914, did unlawfully, knowingly, and feloniously transport and aid and assist in obtaining transportation for the said Clara Holte from Barrington, in the State of Illinois, to Milwaukee, in the State of Wisconsin, and within the jurisdiction of this court, over and along the line and railroad route of a certain common carrier, and known as the Chicago & Northwestern Railway, a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, and a common carrier engaged in the business of the transportation of persons by railroad, for the purposes of prostitution, debauchery, and other immoral practices.

And the grand jurors aforesaid, upon their oaths aforesaid, do further say:

That in pursuance of the said unlawful, corrupt, felonious, and wicked conspiracy, combination, confederation, and agreement, and to effect and attain the object thereof, the said Chester C. Laudenschleger on the said 27th day of March, 1914, did unlawfully, knowingly, and feloniously procure and obtain and aid and assist in procuring and obtaining a certain ticket evidencing the right of
5 the said Clara Holte to go and to be used by her in going in interstate commerce and which was so used by her in going from Barrington, Illinois, to Milwaukee, in the State of Wisconsin, and within the jurisdiction of the court, for an immoral purpose, to wit, for the purpose of having illicit sexual intercourse with her, the said Clara Holte, and which said ticket was a ticket for the transportation of the said Clara Holte upon and over the railway route of the Chicago and Northwestern Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, and a common carrier engaged in interstate commerce and the transportation of persons by railroad from Barrington, in the State of Illinois, to Milwaukee, in the State of Wisconsin, a further and more particular description of which said ticket is to the grand jurors unknown.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That in pursuance of the said unlawful, corrupt, felonious, and wicked conspiracy, combination, confederation, and agreement, and to effect and attain the object thereof, the said Clara Holte, on the said 27th day of March, 1914, did unlawfully, knowingly, and feloniously go and willingly did agree and consent to go and be carried and was transported and carried over and along and upon the line of the Chicago and Northwestern Railway Company, a corporation organized and existing under the laws of the State of Wisconsin, and a common carrier engaged in the business of the transportation of persons by railroad in interstate commerce, from Barrington, Illinois, to Milwaukee, Wisconsin, and within the jurisdiction of the court, for the purposes of prostitution, debauchery, and other immoral practices.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and say:

6 That in pursuance of the said unlawful, corrupt, felonious, and wicked conspiracy, combination, confederation, and agreement, and to effect and attain the object thereof, the said Clara Holte, on the said 27th day of March, 1914, did unlawfully, knowingly, and feloniously consent to go and to be carried and transported, and did in fact go and was in fact carried and transported over and upon the line and route of a certain common carrier in interstate commerce from Barrington, in the State of Illinois, to Milwaukee, in the State of Wisconsin, to wit, upon the line and route of the Chicago and Northwestern Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, and a common carrier engaged in the business of transportation of persons by railroad upon its rail route from Barrington aforesaid to Milwaukee aforesaid, for an immoral purpose, to wit, for the purpose of having illicit sexual intercourse with him, the said Chester C. Laudenschleger.

And so the grand jurors aforesaid, upon their oaths aforesaid, do therefore say: That the said Chester C. Laudenschleger and the said Clara Holte, on the said 27th day of March, 1914, in manner and form as in this indictment charged, did unlawfully, corruptly, feloniously, wickedly, and maliciously conspire, combine, confederate, and agree together and with each other to commit the acts made an offense and crime against the said United States of America by the said act of June 25, 1910, to the evil and pernicious example of all others in like case observing and offending, to the manifest ruination and subversion of youth, and to the debasement and reproach of good morals and the scandal and destruction of the fundamental principles and notions of modesty, decency, and virtue, and thereby and in that manner defrauding the said United States of its governmental function and policy to preserve social order between the States

7 in the matter of preventing interstate commerce being polluted by the transportation of immoral women and women from one

State to another for lewd, licentious, adulterous, and fornicating purposes, and the prohibiting it being used as an instrument and facility for the citizens of one State to do wrong to and in their intercourse and intercommunication with commit offenses against the citizens of other States by effectuating the evils that inhere in all such transportations, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

(Signed) GUY D. GOFF,
United States Attorney, Eastern District of Wisconsin.

(Endorsed as follows:) A true bill. Henry O. Van Eweyk, foreman grand jury. Filed July 16th, 1914. F. C. Westfahl, jr., clerk. Guy D. Goff, U. S. attorney.

8 ARRAIGNMENT AND PLEA.

United States District Court, Eastern District of Wisconsin.

THE UNITED STATES OF AMERICA
vs.
CHESTER C. LAUDENSCHLEGER AND CLARA HOLTE. | Criminal indictment.

July 17, 1914.

Before Honorable Ferdinand A. Geiger, judge.

This day came the district attorney, Mr. Guy D. Goff, and the defendant, Clara Holte, in custody. And the said defendant being arraigned pleads guilty and submits in mercy. And it is ordered by the court that sentence be deferred until July 20, 1914, at 10 o'clock a. m.

9 July 23, 1914. Demurrer filed as follows:

DEMURRER.

District Court of the United States for the Eastern District of Wisconsin.

UNITED STATES, PLAINTIFF,
vs.
CHESTER C. LAUDENSCHLEGER AND CLARA HOLTE, DEFENDANTS.

And now comes the above-named Clara Holte in her own proper person into court, and having heard the said indictment read, says that the said indictment and the matters therein contained in manner and form as the same are above stated and set forth are not sufficient in law, and that she, the said Clara Holte, is not bound by the law of the land to answer the same, and this she is ready to verify; wherefore, for want of sufficient indictment in this behalf, the said Clara

Holte prays judgment and that by the court she may be dismissed and discharged from the said premises in the said indictment specified.

(Signed) LEWIS M. OGDEN,
Attorney for Defendant Clara Holte.

10 And now at this same term, to wit, January term, A. D. 1914, and on the one hundred and sixtieth day thereof, to wit, on the 23rd day of July, A. D. 1914, the following proceedings were had, to wit:

ORDER SUSTAINING DEMURRER TO INDICTMENT.

United States District Court, Eastern District of Wisconsin.

THE UNITED STATES OF AMERICA
vs.
CHESTER C. LAUDENSCHLEGER AND CLARA HOLTE. | Criminal indictment.

July 23, 1914.

Before Honorable Ferdinand A. Geiger, judge.

This day came the district attorney, Mr. Guy D. Goff, and the defendant, Clara Holte, in custody, with her counsel, Mr. L. M. Ogden. And by leave of court the said defendant withdraws her plea of guilty by her before pleaded and demurs to the indictment.

And said demurrer came on to be heard and was argued and submitted. On consideration whereof it is ordered by the court that said demurrer be and hereby is sustained.

Further ordered that said defendant be discharged from custody on her own recognizance in the sum of $1,000.

11 OPINION OF THE COURT.

District Court of the United States, Eastern District of Wisconsin.

UNITED STATES
vs.
CLARA HOLTE AND CHESTER C. LAUDENSCHLEGER.

GEIGER, *District Judge:*

The defendants are indicted for conspiring to commit an offense against the United States. The defendant Laudenschleger was separately indicted for a violation of the white-slave traffic act in that he caused his herein codefendant to be transported in interstate commerce, for immoral purposes, etc. He pleaded guilty thereto and is now serving a sentence imposed upon such plea. The female codefendant, Holte, upon being arraigned, tendered her plea of guilty to the present conspiracy indictment, but, not being represented by counsel, and in view of the importance of the question involved, the

court declined to accept such plea, and appointed Lewis M. Ogden, Esq., a member of the bar, to appear for and advise her in the premises.

Thereupon the plea of guilty was withdrawn and a demurrer to the indictment interposed.

In declining to accept defendant's tendered plea of guilty I was impressed with the idea that the case presented the question, Can a woman or girl who is the subject of a transportation in violation of the white-slave traffic act be indicted with the person who caused her to be transported, as a coconspirator? Counsel have
12 argued this as the only question.

Now, the offense defined by the white-slave traffic act can not be committed without the active or passive presence or concurrence of a woman or girl as the subject of transportation. As such subject of transportation—and an indispensable ingredient or element—the woman or girl can not and does not commit the offense. She can not be both slave and slaver. But the latter's guilt depends upon her presence as a subject of transportation, and the object of the intent which is the other ingredient of the offense. Can she be regarded as a "conspirator"? The negative answer given to this question is, in my judgment, fully supported by United States vs. New York Central Ry. Co., 146 Fed. Rep., 298; Chadwick vs. United States, 141 Fed. Rep., 225; United States vs. Dieterich, 126 Fed. Rep., 664.

An order may be entered sustaining the demurrer.

(Signed) F. A. GEIGER, *Judge.*

(Endorsed:) Filed Aug. 11, 1914. F. C. Westfahl, Jr., clerk.

13 Aug. 21, 1914. Assignment of errors, filed as follows:

United States District Court, Eastern District of Wisconsin.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* CLARA HOLTE AND CHESTER C. LAUDENSCHLEGER, defendants.	Assignments of error.

Comes now the United States of America, the plaintiff in the above-entitled cause, by Guy D. Goff, United States attorney for said district, its attorney, and makes and files the following assignments of error upon which it will rely in its prosecution of the writ of error in the above-entitled cause:

I. That the United States District Court in and for the Eastern District of Wisconsin erred in sustaining the defendant, Clara Holte's demurrer to the indictment in said cause, which said sustaining of said demurrer was based upon and involved a construction of the statutes upon which the said indictment is founded.

II. And that said court erred in construing that under section 37 of the Criminal Code, and sections 2 and 3 of the act of June 25, 1910, upon which the indictment in said action was based, a woman

or girl who is the subject of a transportation in violation of the white-slave traffic act can not be indicted with the person who caused her to be transported as a coconspirator, and that said court
14 erred in sustaining said demurrer, basing its ruling on said construction of said statutes.

Wherefore said plaintiff prays that the judgment of the United States District Court for the Eastern District of Wisconsin be reversed.

GUY D. GOFF,
United States Attorney for said District,
Attorney for Plaintiff, and Plaintiff in Error.

15 Aug. 21, 1914. Petition for writ of error filed, as follows:

PETITION FOR WRIT OF ERROR.

United States District Court, Eastern District of Wisconsin.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
CLARA HOLTE AND CHESTER C. LAUDENSCHLEGER, DEFENDANTS.

Now comes the United States of America, the plaintiff in the above-entitled cause, and respectfully shows:

That on the 23d day of July, A. D. 1914, in the above-entitled cause, the District Court of the United States for the Eastern District of Wisconsin made and entered judgment sustaining a demurrer to the indictment in said cause, which said judgment sustaining said demurrer was based upon the construction of the statute upon which the indictment is founded: that in such judgment, and in the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors, which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the said errors filed herein with this petition and so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

GUY D. GOFF,
U. S. Attorney for said District, Plaintiff's Attorney.

Dated this 21st day of August, A. D. 1914.

16 Let the writ of error issue without bond.

F. A. GEIGER,
United States District Judge, Eastern District of Wisconsin.

Dated this 21st day of August, A. D. 1914.

17 Aug. 21, 1914. Order allowing writ of error filed, as follows:

ORDER ALLOWING WRIT OF ERROR.

United States District Court, Eastern District of Wisconsin.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
CLARA HOLTE AND CHESTER C. LAUDENSCHLEGER, DEFENDANTS.

Comes now the plaintiff in the above-entitled cause, the United States of America, by Guy D. Goff, United States attorney for said district, its attorney, this 21st day of August, A. D. 1914, and files and presents to the court its petition, praying for a writ of error, and praying also that a transcript of the record, proceedings, and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises, and also files its assignment of errors herein.

In consideration whereof, and on motion of Guy D. Goff, United States attorney for said district,

It is ordered that a writ of error be and hereby is allowed to have reviewed in the Supreme Court of the United States the judgment heretofore entered herein, without bond therefor.

By the court:

F. A. GEIGER, *Dist. Judge.*

Dated this 21st day of August, A. D. 1914.

18 Aug. 21, 1914. Præcipe of record on writ of error filed, as follows:

PRÆCIPE.

United States District Court, Eastern District of Wisconsin.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
CLARA HOLTE AND CHESTER C. LAUDENSCHLEGER, DEFENDANTS.

To the Clerk of the United States District Court, Eastern District of Wisconsin:

A writ of error having been issued for a review of this case by the Supreme Court of the United States,

Now, therefore, you are directed to transmit to said Supreme Court of the United States a true copy of the record, including the following files, papers, and proceedings therein, to wit:

Indictment.

Arraignment and plea.

Demurrer.
Opinion of court.
Order sustaining demurrer.
Assignment of errors.
Petition for writ of error.
Order for writ of error.
Writ of error.
Citation.
Præcipe.
Certificate of clerk.

19 All duly certified under your bond and seal of the United States District Court for the Eastern District of Wisconsin.

GUY D. GOFF,
United States Attorney for said Dist.,
Attorney for Plaintiff in Error.

Dated this 21st day of August, A. D. 1914, Milwaukee, Wisconsin.

Service of this præcipe is accepted this 28th day of August, A. D. 1914.

LEWIS M. OGDEN,
Per F. A. LANDECK,
Attorney for Clara Holte, Defendant in Error.

(Endorsed as follows:) Eastern District of Wisconsin, ss. I do hereby certify and return that on the 28th day of August, A. D. 1914. I served the within writ on Lewis M. Ogden, attorney for Clara Holte, by delivering and leaving with Fred A. Landeck, law partner of the said Lewis M. Ogden, a true copy thereof. H. A. Weil, U. S. marshal, by J. H. Vebber, deputy.

20 CERTIFICATE OF CLERK.

UNITED STATES OF AMERICA, *Eastern District of Wisconsin, ss:*

I, F. C. Westfahl, jr., clerk of the District Court of the United States of America for the Eastern District of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate with their originals now on file and remaining of record in my office, and that they are true copies of such originals and correct transcripts therefrom, and that the same is a true copy of the record, assignment of error, and all proceedings in the case of The United States of America vs. Clara Holte et al.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court at the city of Milwaukee, in said district, this 8th day of September, in the year of our Lord one thousand nine hundred fourteen, and of the independence of the United States the 139th.

[SEAL.] F. C. WESTFAHL, Jr., *Clerk.*

21 WRIT OF ERROR.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the judge of the District Court of the United States of America for the Eastern District of Wisconsin, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said District Court of the United States of America for the Eastern District of Wisconsin, before you, between the United States of America, plaintiff, and Clara Holte and Chester C. Laudenschleger, defendants, a manifest error hath happened, to the great damage of the said the United States of America, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the same at Washington, D. C., on the 19th day of September next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error that of right and according to law and custom of the United States should be done.

Witness the honorable Edward D. White, Chief Justice of the said Supreme Court of the United States, this 21st day of August, in the year of our Lord one thousand nine hundred and fourteen and of the independence of the United States the 139th.

F. C. WESTFAHL, Jr., *Clerk.*

22 [Original.]

CITATION.

United States District Court, Eastern District of Wisconsin.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
CLARA HOLTE AND CHESTER C. LAUDENSCHLEGER, DEFENDANT.

UNITED STATES OF AMERICA, *ss.*

To CLARA HOLTE, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C., on the 19th day of September, A. D. 1914, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Eastern District of Wisconsin, wherein the United States of America

is plaintiff in error and you are the defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the honorable F. A. Geiger, District Judge of the United States for the Eastern District of Wisconsin, at the city of Milwaukee, in said district, this 21st day of August, A. D. 1914, and of our independence the one hundred and thirty-ninth (139).

F. A. GEIGER,
U. S. District Judge.

23 Service of this citation is accepted this 28th day of August, A. D. 1914.

LEWIS M. OGDEN,
Per FRED A. LAUDECK,
Attorney for Clara Holte, Defendant in Error.

24 EASTERN DISTRICT OF WISCONSIN, *ss.*

I do hereby certify and return that on the 28th day of August, A. D. 1914, I served the within writ on Lewis M. Ogden, attorney for Clara Holte, by delivering and leaving with Fred A. Laudeck, law partner of the said Lewis M. Ogden, a true copy thereof. Marshal's fees, $2.06.

H. A. WEIL, *U. S. Marshal,*
By J. H. VEBBER, *Deputy.*

(Indorsement on cover:) File No. 24372. E. Wisconsin, D. C. U. S. Term No. 628. The United States, plaintiff in error, vs. Clara Holte. Filed September 19th, 1914. File No. 24372.

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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
CLARA HOLTE.
No. 628.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and moves the court to advance this case and assign it for hearing at an early date during the present term.

The case is before the court upon writ of error sued out by the United States under the so-called Criminal Appeals Act of March 2, 1907 (34 Stat. 1246), and presents the sole question, as stated by the court below (R. 6), "can a woman or girl who is the subject of a transportation in violation of the white-slave traffic act be indicted with the person who caused her to be transported as a coconspirator?"

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The court below held that she could not be so indicted, and therefore sustained the demurrer which had been interposed (R. 6).

The effect of the decision is to cut the Government off from what it conceives to be one of the most potential proceedings in bringing about the prohibition of the traffic denounced in the so-called White Slave Traffic Act of June 25, 1910 (36 Stat. 825), and an early solution of the question raised will materially facilitate future operations under the law, the violations of which constitute one of the most prolific classes of Federal criminal prosecutions.

Notice of this motion has been served on opposing counsel.

JOHN W. DAVIS,
Solicitor General.

NOVEMBER, 1914.

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AUTHORITIES CITED.

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THE UNITED STATES, PLAINTIFF IN ERROR,
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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case was brought here under the "Criminal Appeals Act" (34 Stat. 1246).

The defendant and one Laudenschleger were indicted under section 37 of the Penal Code of the United States for conspiring to have the latter commit the offense defined in section 2 of the "White-Slave Traffic Act" (36 Stat. 825). This defendant first entered a plea of guilty. That plea was subsequently withdrawn, and a demurrer interposed. The court sustained the demurrer, holding that the statutes involved did not permit a woman who was the subject of the unlawful transportation, though a guilty participator, to be indicted as a conspirator with the person who caused her to be transported. (R., 5, 6.) The above ruling presents the sole question to be determined by this court.

Memo: Save as specially otherwise noted italics are ours; and the "White-slave traffic act" is referred to as "White-Slave" act.

THE STATUTES.

Section 37, of the Penal Code, so far as material, reads:

> SEC. 37. If two or more persons conspire * * * to commit any offense against the United States * * * and one or more of such parties do any act to effect the object of the conspiracy, each of the parties * * * shall be fined, etc.

Section 2 of the "White-Slave" act, so far as material, reads:

> SEC. 2. That any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate * * * commerce * * * any woman or girl, for the purpose of prostitution or debauchery, or for any other immoral purpose; * * * or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining, any ticket * * * to be used by any woman or girl in interstate * * * commerce * * * in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, *whereby such woman or girl shall be transported* in interstate * * * commerce * * * shall be deemed guilty of a felony, etc.

ARGUMENT.

THE WOMAN SUBJECTED TO AN UNLAWNUL INTERSTATE TRANSPORTATION MAY (IF A GUILTY PARTICIPATOR) BE INDICTED AS A CONSPIRATOR, WITH THE PERSON CAUSING HER TO BE TRANSPORTED.

A. Principle misapplied by lower court.

The court below misapplied the doctrine that, where a concert of action or a plurality of agents is essential to complete an offense, such agents cannot be indicted for a conspiracy to commit that offense. The misapplication lay in so construing the "White-Slave" act as to bring the offenses therein defined within the operation of that doctrine, the limits of which are thus stated by Mr. Wharton in his work on Criminal Law (11th Ed.):

> **Sec. 1602. Where concert is necessary to offense conspiracy does not lie.** *When* to the idea of an offense *plurality of agents is logically necessary,* conspiracy, which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents, cannot be maintained. As crimes to which concert is necessary (*i. e.*, which cannot take place without concert), we may mention dueling, bigamy, incest and adultery * * * We have here the well known distinction between *concursus necessarius* and *concursus facultativus;* in the latter of which the accession of a second agent * * * *is an element added to its conception;* in the former of which the participation of

> two agents is essential to its conception; * * * In other words when the law says "a combination * * * to effect a particular end shall be called, if the end be effected, *by a certain name*" it is not lawful for the prosecutor to call it by some other name; and when the law says "such an offense * * * shall have a certain punishment" it is not lawful for the prosecution to evade this limitation by indicting *the offense* as conspiracy. Of course when the offense is not consummated, and the conspiracy is one which, by evil means a combination of persons is employed to effectuate, *this combination* is, of itself indictable. And hence persons combining to induce others to commit bigamy, adultery, incest or dueling, do not fall within this exception, and may be indicted for conspiracy.

The doctrine rests upon the principle that where the substantive offense *requires combination* for its commission the *same combination* can not be also used as the basis of a conspiracy charge; *i. e.*, the prosecutor may not split the substantive offense into elements and frame an indictment on one element. But where the substantive offense *may* be consummated *without a combination*, the addition of that element furnishes the *additional ingredient* distinguishing conspiracy from the substantive offense and makes it lawful to indict for either *or both*.

The reasoning of the three cases alone relied on by the court below (the *Chadwick*, *Dietrich*, and *N. Y. C. & H. R. R.* cases) seems so squarely opposed to

its conclusion, that they may be properly canvassed as in support of the argument for the Government.

Chadwick v. *United States* (6th C. C. A.), 141 Fed. 236, 237, properly limits the application of the doctrine. The drawer of a check was indicted for conspiracy to violate section 5208, Revised Statutes, by planning with a bank officer that the latter should certify the former's check, though he had no funds on deposit. The court, speaking through the late Mr. Justice Lurton, said:

> There are certain offenses in which a concert of action between two persons, is logically *necessary* to the completion of the crime; that is, *crime which cannot take place without concert.* Among such kind of offenses Mr. Wharton mentions adultery, bigamy, incest, and duelling. [Here the court quotes a part of the author's text, *supra.*] [And, speaking of the Dietrich case, 126 Fed. 664, relied on by the court below in the case at bar, it continues]:
>
> The case affords an illustration of the proper application of the principle referred to by Mr. Wharton, and is broadly distinguishable from that now under consideration.
>
> * * * Dietrich could not agree to receive a bribe *unless some other person should agree to give him one.* * * * Concert of action was therefore essential to the violation of section 1781, charged as the purpose of the conspiracy.
>
> To violate section 5208, *a plurality of guilty agents* is not necessary. A check may be certified when the drawer has no funds upon

> deposit, and the officer certifying it be guilty of violating the law * * * *without the guilty complicity of the drawer or any other person.* In short, *the very fact that Mrs. Chadwick could not be guilty of any violation of Section 5208 * * * takes the case outside of the rule which forbids an indictment for conspiracy, where a plurality of agents is* logically *necessary* to *complete the crime, which it was the object of the conspiracy to commit.* * * * (citing cases). In *Scott* v. *U. S.*, cited above, the conspiracy was to violate section 5209 * * * by causing certain false entries to be made upon the books of the bank. * * * The overt act charged was the making of the false entries by the hand of the defendant, who was not an agent, servant, employe, or officer of the bank. But it was also averred that both defendants participated in the act, and that the entries were in law made by the bank officer through the hand of another—his co-conspirator. The court held the indictment good. The errors assigned to the present indictment, based upon the objection we have been considering, are not well taken.

As the bank officer could not falsely certify until some one should draw and present a check for certification, so Laudenschleger could not unlawfully transport until there was a woman to be transported. In each instance the drawer or the woman *might* or *might not* be guilty participators. The cases are in parallel.

In *United States* v. *N. Y. C. & H. R. R. Co.*, 146 Fed. 303, upon a charge of conspiracy to cause the railroad company to give rebates, the court, though holding against the possibility of conspiracy, nevertheless said:

> *But when the concurrent action* of two persons *is necessary to perpetrate a certain crime*, and all that they do is to agree to do it, and do it, it seems difficult to claim that their *agreement* to act is in law a conspiracy, and their *act* a distinct crime, and that the agreement to act can be punished more severely or differently from the act itself. I think the offense of giving or receiving rebates is such an act. *It requires the concurrence of two* persons. A rebate can not be given unless there is some one who agrees to receive it and who does receive it, and cannot be received unless there is some one who agrees to give it and who does give it.

The *Dietrich* case is sufficiently distinguished in the *Chadwick* case, *supra*. These three cases are in truth decisive—but *decisive against the application of that doctrine to this case.*

A further case in point is *Ex parte Lyman*, 202 Fed. 303, 304. Section 138 of the Penal Code made it an offense for an officer having a prisoner in custody "to voluntarily suffer such prisoner to escape." The escaping prisoner and officer were indicted for conspiracy. The court said:

> To voluntarily permit a prisoner to escape does not, necessarily, require a common purpose between the officer and the prisoner. For

example: the prisoner escapes through what he deems the neglect of the guard, when, in fact, the officer has been induced by a third person to suffer or permit the escape. In such case, the officer and the third person would be conspirators, and the prisoner not. That a prisoner might conspire with the jail guard for the escape of all his fellow prisoners, but that, the moment the prisoner himself becomes a benefiting party to the scheme the conspiracy is destroyed, seems a lame conclusion.

The Queen v. *Whitchurch and others*, 24 L. R. Q. B. Div. 420, 422, is pertinent. The question and its solution are thus stated:

> *Lord Coleridge, C. J.* I am of opinion that the conviction ought to be affirmed.
>
> The question arises on an indictment charging a woman, who, we must take it, was not in fact with child, with conspiring with others to procure abortion on herself. There might have been something to be said if the indictment had been for an attempt to procure abortion, for in that case the words of the section would not apply. This, however, is an entirely different case. The prisoner is charged with the offence of conspiracy—that is, a combination to commit a felony—and I cannot entertain the slightest doubt that if three persons combine to commit a felony they are all guilty of conspiracy, *although* the *person on whom the offence was intended to be committed could not, if she stood alone, be guilty of the intended offence.* * * *
>
> *Hawkins, J.* I am of the same opinion.

> The prisoner is not charged with using instruments, or administering drugs to herself, for the purpose of procuring abortion, but with conspiring with others to procure abortion. It is clear that she could not lawfully call in other persons to do that which when done by them is a crime punishable with penal servitude. What she did was a conspiracy to commit a criminal act.

In *State* v. *Crofford*, 133 Iowa, 478, 480, the statute provided:

> "If any person with intent to produce the miscarriage of any pregnant woman, wilfully administer to her any drug or substance whatever, or, with such intent, use any instrument or other means whatever, unless such miscarriage shall be necessary to save her life," etc.,

Holding that the woman upon whom the abortion was committed could be a conspirator, the court said:

> * * * This language indicates the design of the lawmakers to treat the woman upon whom the act is perpetrated as the victim, and she can not be guilty of *this* crime. * * * This is in harmony with the conclusion reached by courts generally that she is not to be regarded as an accessory or accomplice (citing cases). But it *does not follow that she may not engage in an unlawful conspiracy with another to perpetrate the offense upon herself.* Section 5059 of the Code declares that if any two or more persons conspire and confederate together to commit a felony, they are guilty of the crime of conspiracy. *This offense is distinct*

> *from the crime which it is the object of the conspiracy to commit, and the acquittal of the one is not a bar to the prosecution of the other.* (Cases.) *Though she may not be guilty of committing an abortion upon herself, it is a crime for another to do so,* and, *if she conspires with others to perform the act, there is no escape from the conclusion that she is a coconspirator,* and that her declarations * * * are admissable in evidence against another conspirator on trial for the commission of the substantive crime.
>
> See also *State ex rel. etc.,* v. *Heugin,* 110 Wisc., 189, 244; *Hannon & Nugent* v. *Comm.,* 14 Pa. St., 226, 227; *Thomas* v. *United States,* 156 Fed., 897, 903; *Drew, Sheriff etc.* v. *Thaw,* No. 514 Oct. Term 1914, decided Dec. 21, 1914.)

In the last case the court said:

> "It is perfectly possible * * * to enact that a conspiracy to accomplish what an individual is free to do, shall be a crime."

That *concursus necessarius* is not an essential to the offense defined by section 2 of the "White-Slave" act is demonstrated by the following excerpt from the report of the House committee thereon:

> It is the *purpose of the proposed laws* * * * to *protect women* and girls *against this criminal traffic, by* providing for *the punishment of those engaged in that traffic,* and by regulations, etc. Extensive investigation * * * discloses the fact that in many cases * * * Liquor, trickery, deceit, fraud, and the use of

> force are resorted to by the procurer to place the girl under his power. In some cases, those who have been induced to come to large cities, are first introduced to the house of prostitution under the influence of liquor; in others, the procurer enters into a pretended marriage with his victim; in many cases * * * the inducement is the promise of legitimate employment * * * The investigations * * * conclusively show * * * that for sometime after they are first unwillingly forced to take up a life of prostitution the victims would at once abandon it if it were possible for them to do so. (Page 11, H. Rep. No. 47, 61st Cong., 2d sess.)

In *Hoke* v. *United States*, 227 U. S. 320, this court said:

> What the act condemns is transportation obtained or aided, or transportation induced in interstate commerce, for the immoral purposes mentioned.

In *Bennett* v. *United States*, 194 Fed. 630, 632 (affirmed by this court in 227 U. S. 333), the court (6th C. C. A.) said:

> The primary thing forbidden is the inducing * * * to come in to the state, *with unlawful purpose by the inducer and* in aid of such unlawful purpose, *but without direct regard to the* innate character or *purpose of the person induced. It is this primary thing, and the incidental transportation* * * * which are forbidden and penalized.

In *United States* v. *Westman*, 182 Fed. 1017–1018, the court said:

> The law in its intendment, is aimed at the transportation of certain persons, or the procuring to be transported such persons, from one state to another, for evil, immoral, unlawful, and pernicious purposes, etc.

These cases negative the idea that guilty complicity on the part of the woman transported is a necessary ingredient of the substantive offense. That being so, there is no principle of law rendering it legally impossible for a woman to conspire with a man to unlawfully transport her. In many cases the woman might be more active than the man in producing that result, especially if actuated by an ulterior motive of personal gain. It would be unfortunate if the deterrent influence, arising from dread of possible punishment for herself, should she *incite others* to commit this crime upon her, were to be wholly removed.

As Laudenschleger and any third person could have been guilty of conspiracy in planning to accomplish the unlawful transportation of Holte, can it be said that the participation of the latter in that plan should give immunity to the other two? On the other hand, on what theory could they be held if Holte was discharged, or either of them be then punished, if the transportation never took place, though the ticket had been bought?

Suppose the "White-Slave" act had contained this additional clause—

> or who shall buy for her own use in going, shall use in going, or shall go, in interstate commerce for any such purpose—

would it then be seriously contended, in the face of the above decisions and of the *Gavieres case, infra*, that either Laudenschleger, Holte, or any third person criminally planning with either or both for the unlawful transportation of Holte, could not be proceeded against for conspiracy after the purchase of the ticket (or even after the mere purchase of a wardrobe if bought for the unlawful purpose), even though the main offense was never accomplished because the plan was interrupted before Holte could take the journey? While the presence or absence of the assumed clause would be most material, as to Holte, if her case were being considered under section 2, it is of no moment when considered under section 37, *supra*.

The court below recognized that the active "presence or concurrence" of the woman was unnecessary. And that concession demonstrates the impossibility of applying the doctrine of "concert of action" as elucidated in the cases it relied on.

B. The True Doctrine.

In the last analysis the question resolves itself to this: Is the offense of conspiracy to commit the main offense *legally identical* with *that offense* as defined by section 2 of the "White-Slave" act?

If identical, then because section 2, *supra*, does not attempt to punish the woman transported, she may not be punished for the *same offense* under the name of "conspiracy." If not identical, she *may* be so punished, if a guilty party to a *criminal plan* for her own unlawful transportation.

What then is the test of legal identity? A fixed rule for its determination has been repeatedly announced *by this court*. If the act prohibited by each statute *demands* for its accomplishment the doing of the *same things*, then there is legal identity. If, however, any element is demanded by either, that is not essential to the other, then they are separately punishable as different offenses, even though the elements of both may be furnished by the same single happening. (And indeed, this is the very principle announced in the *Crofford* case, last above quoted.)

In *Gavieres* v. *United States*, 220 U. S. 342, the plaintiff in error was sentenced for insulting a public officer in violation of the Penal Code of the Philippine Islands. He had previously been convicted, on account of the *very same words and conduct*, under a city ordinance of Manila, punishing boisterous behavior. He plead double jeopardy against the second charge, insisting he could be punished but once for the same single act. The court said:

> The question therefore is, are the offenses charged, and of which a conviction has been had in the municipal court and in the Court of First Instance, identical. * * * It is true that the acts and words set forth in both

charges are the same; but in the second it was charged, as was essential to conviction, that the misbehavior in deed and words was addressed to a public official. In this view we are of the opinion, *that, while the transaction charged is the same in each case, the offenses are different.* * * * This case (*Morey* v. *Comm.*, 108 Mass., 433), was cited with approval in *Carter* v. *McClaughry*, 183 U. S., 367, 395. In the *Carter case*, speaking of the identity of offenses charged, this court said: "The offenses charged under this article were not one and the same offense. This is apparent if the test of identity of offenses, that the same evidence is required to sustain them, be applied." *The first charge alleged "a conspiracy to defraud,"* and the second charge *alleged "causing false and fraudulent claims to be made," which were separate and distinct offenses, one requiring certain evidence which the other did not. The fact that both charges related to and grew out of one transaction made no difference.* In *Burton* v. *United States*, 202 U. S., 344, 381, * * * this court said: * * * "The plea will be vicious if the offenses charged in the two indictments be perfectly distinct in point of law, *however nearly they may be connected in fact.*" (italics the courts) * * * it was necessary to aver and prove the insult to a public official * * * in his presence * * *. Without such charge and proof, there could have been no conviction in the second case. The requirement of *insult to a public official was* lacking in the first offense. Upon the charge, under the

> ordinance, it was necessary to show that the offense was committed in a public place * * *; the insult to a public official need only be in his presence * * *. Each offense required proof of a fact which the other did not. Consequently a conviction of one would not bar a prosecution for the other. * * * While it is true that the *conduct of the accused was one and the same, two offenses resulted, each of which had* an element not embraced in the other.
>
> (See also *Heike* v. *United States*, 227 U. S., 131, 144; *United States* v. *McAndrews Co.*, 149 Fed., 836.)

C. The application of the rule.

The case is not within the exception of "*concursus necessarius.*" The rule of *diversity* of *offenses*, and *not* the above exception must be applied. The case at bar responds completely to every test under the diversity rule.

The indictment charges that defendants "agreed that *Laudenschleger* should * * * transport * * * (her) in interstate commerce" and get her a railroad ticket to be used by her in riding from Barrington, Ill., to Milwaukee, Wis., "for the purpose of *prostitution, debauchery,* and other immoral practices." (R. 1, 2.) The averments as to allowing herself to be "induced and *coerced*" may be disregarded as surplusage because (1) they are no part of the offense defined by section 2, and the Government does not rely on section 3 at all; and (2), they are

legally impossible in the case of this guilty conspirator.

The statute, section 2, *supra*, is satisfied by proof of the unlawful transportation, without *any concert* of purpose. Whereas section 37, *supra*, is satisfied only by concert, *i. e.*, unlawful plan and overt act, but without any transportation. The element of actual transportation is necessarily present in the former, though lacking in the latter; while the element of unlawful plan is necessarily present in the latter, though lacking in the former.

Laudenschleger pleaded guilty to conspiracy, and his plea was accepted by the court. And yet, if the offenses were legally identical, his case would be the same as that of the woman upon this indictment for conspiracy. If the discharge of Holte was justified, Laudenschlager would be left in the attitude of conspiring with himself.

But two features can be urged as differentiating her case: (1) That she could not be guilty of the main offense; and (2) that she was the person to be transported. And we have already seen that neither of these features legally distinguishes the case. (Cases cited "A" *supra*.)

As the law stood before the "White-Slave" act, any person, man or woman, who wilfully planned to commit any offense against the United States was subject to punishment under section 37. In creating the new offense (sec. 2, *supra*) Congress had no purpose to amend the conspiracy statute so that it should read "any offense against the United States, *save*

only that defined by the 'White-Slave Traffic Act;'" nor any purpose to give the woman transported, a license to *plan with others* to devote her body to prohibited sexual uses; nor any purpose to give her in advance a full pardon for any such after conspiracy. As the Treaty which the "White-Slave" act was intended to effectuate, and as the title and history of the act alike indicate, it was aimed at the suppression of a *traffic* that had assumed such large proportions as to have gained a distinctive title, both in this country and in Europe, and that involved the transportation of women from place to place for sexual uses. Before the passage of the act, no one concerned in that traffic was punishable under the *Federal* law. And after its passage, *procurers only* were punishable by *its* terms. *That* act did not concern itself with the "procured" save to protect them. Any woman, determined to this indulgence, but wishing to hide her shame from her neighbors, might *after*, as much as before, its passage, buy a ticket and journey to a neighboring State for such purpose without, by so doing, incurring the penalty prescribed by *that* act.

But, mindful of the general conspiracy statute, Congress in effect, said to the woman: "Whether you are a victim, or voluntarily acting (if acting alone), we take no notice of you save to help you, in the former case. But remember: This interstate transportation, so far as the procurer is concerned, is made a crime, and if you transport *another* woman you will be punishable under *this* act; or if you *plan* with another

for your own *unlawful transportation by that other person*, there is another statute (section 37) which automatically operates *on new* offenses from time to time, as they are created (*United States* v. *Stevenson*, 215 U. S. 202, 203; *Curley* v. *United States*, 130 Fed. 1) that will punish you, as planning for the commission by that other person of an offense against the United States.

The indictment here contains the essential averment of a plan and agreement by both defendants that Laudenschleger should commit the offense of unlawfully transporting Holte—an averment that would have no place in an indictment against the former for unlawfully transporting her. And had the indictment omitted the first, third, and fourth overt acts (showing actual after transportation), the second (the ticket purchase) alone would have completed the conspiracy offense. On trial none other than the second overt act need be proven. If the others were proven the later consummation of the main offense by Laudenschleger could not swallow up, or give immunity to, the earlier completed crime of conspiracy. (*Heike* v. *United States*, 227 U. S., 131, 144; *Curley* v. *United States*, 130 Fed., 1; *United States* v. *Stamatopolous*, 164 Fed., 524; *Solander* v. *People*, 2 Colo., 48; *State* v. *Crofford*, *supra*.) To so hold would—as was pointed out in the Government's brief in opposition to the petition for certiorari, filed in this court in the so-called *Dynamiters' case*—be, in effect, to offer a premium for multiplied crime [*Heike*

case, *supra*, (142)], and to make a second crime operate as a pardon for an earlier one.

The court below must have thought that, as the woman subject of the transportation could not have been punished before the passage of the "White-Slave" act, and as manifestly Congress had not undertaken in that act to punish *her*, but had limited the punishment to *procurers*, she could not be punished for any action of hers *related to*, or *arising from* the things prohibited by that act. The error in this line of thought is threefold. First, it overlooks the fact that there was a *general* criminal statute (sec. 37, *supra*) punishing *every* person participating *in any criminal plan*, which statute became automatically operative with respect to new offenses against the United States, as they should be from time to time created by Congress. Second, the "White-Slave" act punished the procurer for unlawful transportation. This being the new offense, anybody entering into a plan whereby the *procurer* should unlawfully transport, necessarily plans for the commission of an offense by another. (*United States* v. *Stevenson supra*, 203.) And third, though the penalty provisions of the crime punished by section 2 were limited exclusively to procurers, no corresponding limitation is to be found in section 37, which, being aimed at *every person* must apply to the defendant Holte. (*United States* v. *Portale et al.*, 235 U. S. 27; *United States* v. *Lewis*, No. 380, decided Nov. 30, 1914.)

The court below appreciated that it was necessary to find some legal path along which to transport the

immunity from punishment of the woman transported (which was an incident *only* to the offense under the "White-Slave" act), to the field occupied by the conspiracy statute; and it assumed to find this path in the doctrine of "*concursus necessarius.*" It had, as we have shown, no right to travel *this* path to reach its conclusion. The only other path available was along the doctrine of legal identity of offenses. The court below itself saw the impossibility of using the latter. It really took an "aviation" route, unknown to the law.

It is not the policy of the law to suffer people to, with impunity, jointly plan the commission of crime. (*Drew* v. *Thaw, supra.*) It is often but a step from plan to performance, and if people could, without risk, jointly plan, plans would be more frequent, and when developed, might appear so inviting as to themselves induce performance. Where, as here, the *large* purpose of the law was to reach those systematically conducting the traffic—and system always demands *plan*—there could have been no thought of making this particular crime an exception to the general prohibition of the conspiracy statute.

This view is strengthened by the thought that because practically the same language is found in sections 2 and 3 of the Immigration Act as amended March 26, 1910 (36 Stat. 263), the application of the principle here contended for would materially aid, (through the enforcement of that act also) in the accomplishment of the results sought by the Paris Conference treaty of July 25, 1902 (35 Stat. 1979).

CONCLUSION.

The court below erred in applying the exception of "necessary concert" to this case, and in holding that the facts averred in the indictment did not constitute a violation of section 37 as applied to section 2 of the "White-Slave" act. The judgment should therefore be reversed, with instructions to overrule the demurrer.

WILLIAM WALLACE, JR.,
Assistant Attorney General.

DECEMBER, 1914.

UNITED STATES *v.* HOLTE.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

No. 628. Argued January 8, 1915.—Decided February 1, 1915.

A woman who is transported in violation of the White Slave Traffic Act of 1910 may be guilty of conspiracy with the person transporting her to commit a crime against the United States under § 37 of the Penal Code of March 4, 1899.

THE facts, which involve the construction of the White Slave Traffic Act of 1910 and of § 37 of the Penal Code, are stated in the opinion.

Mr. Assistant Attorney General Wallace for the United States:

The woman subjected to an unlawful interstate transportation may, if a guilty participator, be indicted as a conspirator with the person causing her to be transported.

The court below misapplied the doctrine that, where a concert of action or a plurality of agents is essential to complete an offence, such agents cannot be indicted for a conspiracy to commit that offence. See Wharton's Criminal Law, 11th ed., § 1502.

Chadwick v. *United States*, 141 Fed. Rep. 236; *Dietrich* v. *United States*, 126 Fed. Rep. 664, and *United States* v. *N. Y. C. & H. R. R.*, 146 Fed. Rep. 303, are decisive against the application of that doctrine to this case. See also *Ex parte Lyman*, 202 Fed. Rep. 303, construing § 138, Penal Code; *The Queen* v. *Whitchurch*, 24 L. R. Q. B. Div. 420; *State* v. *Crofford*, 133 Iowa, 478; *State* v. *Heugin*, 110 Wisconsin, 189, 244; *Hannon* v. *Commonwealth*, 14 Pa. St. 226; *Thomas* v. *United States*, 156 Fed. Rep. 897, 903; *Drew* v. *Thaw*, 235 U. S. 432, holding that it is perfectly possible to enact that a conspiracy to accomplish what an individual is free to do shall be a crime.

Concursus necessarius is not an essential to the offence defined by § 2 of the White Slave Act. See H. R. No. 47, 61st Cong., 2d Sess., p. 11; *Hoke* v. *United States*, 227 U. S. 320; *Bennett* v. *United States*, 194 Fed. Rep. 630; *S. C.*, 227 U. S. 333; *United States* v. *Westman*, 182 Fed. Rep. 1017.

The offence of conspiracy to commit the main offence is not legally identical with that offence as defined by § 2 of the White Slave Act. As it is not identical, the woman transported may be punished, if a guilty party to a criminal plan for her own unlawful transportation. See *Gavieres* v. *United States*, 220 U. S. 342; *Heike* v. *United States*, 227 U. S. 131, 144; *United States* v. *McAndrews Co.*, 149 Fed. Rep. 836.

The case is not within the exception of *concursus necessarius*. The rule of diversity of offences, and not the above exception, must be applied. The case at bar responds completely to every test under the diversity rule.

As the law stood before the White Slave Act, any person, man or woman, who wilfully planned to commit any offence against the United States was subject to punishment under § 37, Penal Code. In creating the new offence under § 2 of the White Slave Act, Congress had no purpose to amend the conspiracy statute so that it should read "any offence against the United States, save only that defined by the White Slave Traffic Act;" nor any purpose to give the woman transported a license to plan with others to devote her body to prohibited sexual uses; nor any purpose to give her in advance a full pardon for any such after conspiracy.

Section 37, Penal Code, automatically operates on new offences from time to time, *United States* v. *Stevenson*, 215 U. S. 202; *Curley* v. *United States*, 130 Fed. Rep. 1, and will punish persons planning for the commission by another person of an offence against the United States.

The indictment here contains the essential averment of a plan and agreement by both defendants that one should commit the offence of unlawfully transporting defendant—an averment that would have no place in an indictment against the former for unlawfully transporting her. And had the indictment omitted the first, third, and fourth overt acts (showing actual after transportation), the second (the ticket purchase) alone would have completed the conspiracy offence. On trial none other than the second overt act need be proven. If the others were proven, the later consummation of the main offence by Laudenschleger could not swallow up, or give immunity to, the earlier completed crime of conspiracy. *Heike* v. *United States*, 227 U. S. 131, 144; *Curley* v. *United States*, 130 Fed. Rep. 1; *United States* v. *Stamatopolous*, 164

Fed. Rep. 524; *Solander* v. *People*, 2 Colorado, 48; *State* v. *Crofford*, 133 Iowa, 478.

Though the penalty provisions of the crime punished by § 2 were limited exclusively to procurers, no corresponding limitation is to be found in § 37, which, being aimed at every person, must apply to the woman transported. *United States* v. *Portale*, 235 U. S. 27; *United States* v. *Lewis*, 235 U. S. 282.

It is not the policy of the law to suffer people to, with impunity, jointly plan the commission of crime. *Drew* v. *Thaw*, 235 U. S. 432. It is often but a step from plan to performance, and if people could, without risk, jointly plan, such plans would be more frequent, and when developed, might appear so inviting as to themselves induce performance. Where, as here, the large purpose of the law was to reach those systematically conducting the traffic—and system always demands plan—there could have been no thought of making this particular crime an exception to the general prohibition of the conspiracy statute.

This view is strengthened by the thought that because practically the same language is found in §§ 2 and 3 of the Immigration Act as amended March 26, 1910, 36 Stat. 263, the application of the principle here contended for would materially aid, through the enforcement of that act also, in the accomplishment of the results sought by the Paris Conference treaty of July 25, 1902, 35 Stat. 1979.

No appearance or brief filed for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an indictment for a conspiracy between the present defendant and one Laudenschleger that Laudenschleger should cause the defendant to be transported from Illinois to Wisconsin for the purpose of prostitution,

contrary to the act of June 25, 1910, c. 395; 36 Stat. 825. As the defendant is the woman, the District Court sustained a demurrer on the ground that although the offence could not be committed without her she was no party to it but only the victim. The single question is whether that ruling is right. We do not have to consider what would be necessary to constitute the substantive crime under the act of 1910, or what evidence would be required to convict a woman under an indictment like this; but only to decide whether it is impossible for the transported woman to be guilty of a crime in conspiring as alleged.

The words of the penal code of March 4, 1909, c. 321, § 37, 35 Stat. 1088, are "conspire to commit an offence against the United States" and the argument is that they mean an offence that all the conspirators should commit; and that the woman could not commit the offence alleged to be the object of the conspiracy. For although the statute of 1910 embraces matters to which she could be a party, if the words are taken literally, for instance, aiding in procuring any form of transportation for the purpose; the conspiracy alleged, as we have said, is a conspiracy that Laudenschleger should procure transportation and should cause the woman to be transported. Of course the words of the penal code could be narrowed as we have suggested, but in that case they would not be as broad as the mischief and we think it plain that they mean to adopt the common law as to conspiracy and that 'commit' means no more than bring about. For as was observed in *Drew* v. *Thaw*, 235 U. S. 432, a conspiracy to accomplish what an individual is free to do may be a crime, *Reg* v. *Mears*, 4 Cox. C. C. 423; 2 Den. C. C. 79; *Reg* v. *Howell*, 4 F. & F. 160, and even more plainly a person may conspire for the commission of a crime by a third person. We will assume that there may be a degree of coöperation that would not amount to a crime, as where it was held that a purchase of spirituous liquor from an unlicensed vendor

was not a crime in the purchaser although it was in the seller. *Commonwealth* v. *Willard*, 22 Pick. 476. But a conspiracy with an officer or employé of the government or any other for an offence that only he could commit has been held for many years to fall within the conspiracy section, now § 37 of the penal code. *United States* v. *Martin*, 4 Cliff. 156, 164; *United States* v. *Bayer*, 4 Dillon, 407, 410; *United States* v. *Stevens*, 44 Fed. Rep. 132, 140; *State* v. *Huegin*, 110 Wisconsin, 189, 246. So a woman may conspire to procure an abortion upon herself when under the law she could not commit the substantive crime and therefore, it has been held, could not be an accomplice. *The Queen* v. *Whitchurch*, 24 Q. B. D. 420, 422; *Solander* v. *The People*, 2 Colorado, 48, 63; *State* v. *Crofford*, 133 Iowa, 478, 480.

So we think that it would be going too far to say that the defendant could not be guilty in this case. Suppose, for instance, that a professional prostitute, as well able to look out for herself as was the man, should suggest and carry out a journey within the act of 1910 in the hope of blackmailing the man, and should buy the railroad tickets, or should pay the fare from Jersey City to New York, she would be within the letter of the act of 1910 and we see no reason why the act should not be held to apply. We see equally little reason for not treating the preliminary agreement as a conspiracy that the law can reach, if we abandon the illusion that the woman always is the victim. The words of the statute punish the transportation of a woman for the purpose of prostitution even if she were the first to suggest the crime.—The substantive offence might be committed without the woman's consent, for instance, if she were drugged or taken by force. Therefore the decisions that it is impossible to turn the concurrence necessary to effect certain crimes such as bigamy or duelling into a conspiracy to commit them do not apply.

Judgment reversed.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of this case.

MR. JUSTICE LAMAR, with whom MR. JUSTICE DAY concurs, dissenting.

I dissent from the conclusion that a woman can be guilty of conspiring to have herself unlawfully transported in interstate commerce for purposes of prostitution.

Congress had no power to punish immorality and certainly did not intend by this act of June 25, 1910 (36 Stat. 825) to make fornication or adultery, which was a state misdemeanor, a Federal felony punishable by $5,000 fine and five years' imprisonment. But when it appeared that there was a traffic in women to be used for purposes of prostitution, debauchery and immoral purposes, Congress legislated so as to prohibit their interstate transportation in such vicious business. That there was such traffic in women and girls; that they were "literally slaves," "owned and held as property and chattels," and that their traffickers made large profits, is set out at length in the Reports of the House and Senate Committees (61st Congress, 2d Session) recommending the passage of the bill. So that an argument based on the use of the words "slave," "enslaved," "traffic in women," "business in women," "subject of transportation" and the like,—which might otherwise appear to be strained,—is amply justified by the amazing facts which those reports show as to the existence and extent of the business and the profits made by the traffickers in women. The argument based on the use of these words, and what they imply, is further justified by the fact that the statute itself declares (§ 8) that it shall be known as the "White Slave Traffic Act." In giving itself such a title the statute specifically indicates that, while of right, woman is not an object of merchandise or traffic, yet for gain she has by

some been wrongfully made such for purposes of prostitution—and that trade Congress intended to bar from interstate commerce.

The Act either applies to women who are willingly transported or it does not. If it does not apply to those who willingly go (47 H. R. 61st Cong. 2d Session, p. 10) then there was no offence by the man who transported her or in the woman who voluntarily went,—and, in that event there was, of course, no conspiracy against the laws of the United States in her agreeing to go. The indictment here, however, assumes that the Act applies not only to those who are induced to go, but also to those who aid the panderer in securing their own transportation. On that assumption, every woman transported for the purposes of the business stands on the same footing and cannot by her consent change her legal status. And if she cannot be directly punished for being transported, she cannot be indirectly punished by calling her assistance in the transportation a conspiracy to violate the laws of the United States. For if she is within the circle of the statute's protection she cannot be taken out of that circle by the law of conspiracy and thus be subjected to punishment because she agreed to go.

The statute does not deal with the offence of fornication and adultery, but treats the woman who is transported for use in the business of prostitution as a victim—often a willing victim but nevertheless a victim. It treats her as enslaved and seeks to guard her against herself as well as against her slaver; against the wiles and threats, the compulsion and inducements, of those who treat her as though she was merchandise and a subject of interstate transportation. The woman, whether coerced or induced, whether willingly or unwillingly transported for purposes of prostitution, debauchery and immorality, is regarded as the victim of the trafficker and she cannot therefore be punished for being enslaved nor for consenting and agree-

ing to be transported by him for purposes of such business. To hold otherwise would make the law of conspiracy a sword with which to punish those whom the Traffic Act was intended to protect.

The fact that prostitutes and others have used this statute as a means by which to levy blackmail may furnish a reason why that should be made a Federal offence, so that she and they can be punished for blackmail or malicious prosecution. But those evils are not to be remedied by extending the law of conspiracy so as to treat the enslaved subject of transportation as a guilty actor in her own transportation; and then punish her because she agreed with her slaver to be shipped in interstate commerce for purposes of prostitution. Such a construction would make every willing victim indictable for conspiracy. Even that elastic offence cannot be extended to cover such a case.

There are no decisions dealing directly with the question as to whether a woman assisting in her own illegal transportation can be prosecuted for conspiracy. There are, however, a number of authorities dealing with somewhat analogous subjects. For example, in prosecutions for abortion "the woman does not stand legally in the situation of an accomplice, for although she no doubt participated in the immoral offence imputed to the defendant, she could not have been indicted for the offence. The law regards her as the victim rather than the perpetrator." *Dunn* v. *People*, 29 N. Y. 523; *Commonwealth* v. *Wood*, 11 Gray, 85; *State* v. *Hyer*, 39 N. J. Law, 598; *State* v. *Murphy*, 27 N. J. Law, 112, 114; *Commonwealth* v. *Follansbee*, 155 Massachusetts, 274; *State* v. *Owens*, 22 Minnesota, 238, 244; *Watson* v. *State*, 9 Tex. App. 237; *Keller* v. *State*, 102 Georgia, 506, 510 (seduction). *Contra* apparently in England and Colorado. *Queen* v. *Whitchurch*, 24 Q. B. D. 420; *Solander* v. *People*, 2 Colorado, 48. So, too, a person who knowingly purchases liquor from one

unauthorized to sell it is not guilty of a criminal offence and is not an accomplice. *State* v. *Teahan*, 50 Connecticut, 92, 100; *Commonwealth* v. *Pilsbury*, 12 Gray, 127; *People* v. *Smith*, 28 Hun, 626; affirmed on opinion below, 92 N. Y. 665; *State* v. *Baden*, 37 Minnesota, 212.

Where the purchaser of liquor sold in violation of law was prosecuted for inducing the seller to commit a crime, the court said:

"Every sale implies a purchaser; there must be a purchaser as well as a seller, and this must have been known and understood by the legislature. Now, if it were intended that the purchaser should be subject to any penalty, it is to be presumed, that it would have been declared in the statute, either by imposing a penalty on the buyer in terms, or by extending the penal consequences of the prohibited act, to all persons aiding, counselling or encouraging the principal offender. There being no such provision in the statute, there is a strong implication, that none such was intended by the legislature." *Commonwealth* v. *Willard*, 22 Pick. 479. *United States* v. *Dietrich*, 126 Fed. Rep. 667, though not directly in point sheds light on the subject. There two persons were indicted under Rev. Stat. 5440 for conspiring to violate that law of the United States (Rev. Stat. 1781) which makes it a criminal offence to agree to give or to receive a bribe. The court held that agreeing to give or receive a bribe was the substantive offence and not a conspiracy. For when an offence, as bigamy or adultery, requires for its completion the concurrence of two persons, "the Government cannot evade the limitations by indicting as for a conspiracy."

And in *Queen* v. *Tyrrell*, 1 Q. B. 711 (1894), where a girl under 15 years of age was prosecuted for inciting a man to commit adultery with her, one of the judges considered that she could not be found guilty because she was under the age of consent, and the other said that the statute did not apply because "there is no trace in the

statute of any intention to treat the woman or girl as criminal."

Applying these cases, it appears that under the White Slave Traffic Act there must be a woman who is transported and a person who compels or induces her to be transported or who aids her in such transportation. "There is no trace in the statute of any intention to treat the women or girls as criminals" for being transported, nor for agreeing that they will be transported, nor for aiding in the transportation. And if, as said in *Commonwealth* v. *Willard*, 22 Pick. 479, Congress had intended that they should be subject to indictment for conspiracy "*it would have so declared by extending the penal consequences of the prohibited act to all persons aiding, counselling or encouraging the principal offender.* There being no such provision in the statute, there is a strong implication that none such was intended by the legislature."

To this may be added the practical consideration, that any construction making the woman liable for participation in the transportation will not only tend to prevent her from coming forward with her evidence, but in many instances she will be in position to claim her privilege and can refuse to testify on the ground that she might thereby subject herself to prosecution for conspiracy in that she aided in the violation of the law, even though it was intended for the protection of her unfortunate class.

The woman, whether treated as the willing or an unwilling victim of such transportation for such business purpose, cannot be found guilty of the main offence nor punished for the incidental act of conspiring to be enslaved and transported. Indeed, if she could be so punished for conspiring with her slaver, the fundamental idea that makes the act valid would be destroyed. She would cease to be an object of traffic; and instead of being the subject of illegal transportation would—not be transported by a slaver as an object of interstate commerce,

so as to be subject to regulative prohibitions under the Commerce Clause—but would be voluntarily traveling on her own account, and punishable by the laws of the State for prostitution practiced after her arrival.

I am authorized to say that MR. JUSTICE DAY concurs in this dissent.